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No. 159

IN THE

Supreme Court of the United States

October Term, 1964

COOPER-JARRETT, INC., ET AL.
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

CARL E. ENGGAS
1006 Grand Avenue
Kansas City, Missouri 64106

D. ROBERT THOMAS
11 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Freight Forwarder Appellees

JOHN F. DONELAN
Brawner Bldg.
Washington, D. C. 20006
Attorney for The National Industrial Traffic League, Appellee

NUEL D. BELNAP
One North LaSalle Street
Chicago, Illinois 60602
Attorney for Shipper Appellees

LOUIS A. HARRIS
HARVEY HUSTON
80 East Jackson Blvd.
Chicago, Illinois 60604
Attorneys for Transcontinental Railroads, Appellees

JOHN A. DAILY
PAUL R. DUKE
1138 Transportation Center
Philadelphia, Pa. 19104
Attorneys for Eastern Railroads, Appellees

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the railroads, shippers and freight forwarders, involved in this case, move that the unanimous judgment of the district court be affirmed on the ground that the questions on which the decision depends are so unsubstantial as not to need further argument. The names of these appellees are listed in Appendix A hereto. The opinion of the district court is reported at 226 F. Supp. 318 and is reproduced at pages 1a to 18a of the Jurisdictional Statement.

STATEMENT

This is a direct appeal from the final judgment of a district court dismissing the suit of the motor carrier appellants to set aside an order in which the Interstate Commerce Commission unanimously approved certain railroad rates, charges and rules. The Commission's decision is reported at 314 I.C.C. 5 and is reproduced at pages 19a *et seq.* of the Jurisdictional Statement.

The issues of lawfulness decided by the Commission concerned certain Plan III and Plan IV trailer-on-flat-car (TOFC)—sometimes called "Piggy Back"—services and rates. Under Plan III, the railroads hold out in their tariffs to provide TOFC services from ramps in railroad yards at specified origins to ramps in railroad yards at specified destinations. These Plan III rates apply where the shipper desires to tender his trailers or other containers, loaded or empty, to the railroad at the origin railroad terminal for movement on railroad flatcars to the destination railroad terminal. Plan III rates and services are designed to be competitive with private transportation, and the rates are therefore fixed at a level which will induce shippers to use the railroads' terminal-to-terminal service in place of the highway operation of their own tractors in intercity movement of their trailers (314 I.C.C. 9-10, 12, 17, 21; J.S. 25a-26a, 30a, 37a, 42a).

Similarly, Plan IV rates apply where the shipper tenders his flatcar, with his trailers or containers (loaded or empty) to the railroad for transportation between the rail terminals (314 I.C.C. 9-12, 22; J.S. 26a-29a, 43a-45a).

The lawfulness of TOFC rates for movement of the shippers' trailers between rail terminals has long been recognized. Contrary to the assertion by appellants that these are "new" plans (J.S. 11), the principles involved in Plans III and IV are identical in form with some of the earliest TOFC rates to come before the Commission.

In The Matter of Container Service, 182 I.C.C. 653 (1932), *Vehicle Container Rates in Southwest*, 196 I.C.C. 127 (1933), and *Trucks on Flatcars Between Chicago and Twin Cities*, 216 I.C.C. 435 (1936) presented to the Commission rates and services substantially identical in all relevant respects with those at issue here.

Only Plan III and Plan IV rates and services are at issue in this appeal. However, most of appellants' contentions with respect to the alleged unlawfulness of Plans III and IV stem from the fact that some railroads contemporaneously maintain rates and services under Plan II tariffs. Plan II rates and services are for shippers who do not desire to ship their own trailers, but desire, instead, to have the railroads pick up their freight at the shipper's dock for handling in railroad trailers to the consignee's dock (314 I.C.C. 9; J.S. 25a).

The appellants challenged the validity of the Commission's order in the district court on the ground that the Plan III and Plan IV rate and tariff provisions "are unlawful *per se*" for six different reasons, one of which was abandoned on oral argument (226 F. Supp. 321; J.S. 4a-5a). The court, identifying each of these contentions by number, found them lacking in merit (226 F. Supp. 327; J.S. 18a).

The rulings of the district court in the order of its rejection of the appellants' specific contentions may be summarized as follows:

1. Sections 1(3), 1(4), 1(10) and 1(11) of the Interstate Commerce Act are not violated when services held out and rendered by railroads for Plan III and Plan IV charges are limited by the tariffs to the ramp-to-ramp services above described (226 F. Supp. 322-323; J.S. 7a-9a).

2. Section 15(13) of the Interstate Commerce Act does not limit railroads to the publication of Plan II dock-to-dock rates with specific allowances therefrom for shippers

who desire only to ship trailers between rail terminals; separate Plan III and Plan IV rates for the latter services are lawful (226 F. Supp. 323-324; J.S. 9a-12a).

3. Nothing in Plans III or IV provides for, or even suggests any "rebate, concession or discrimination" in violation of the Elkins Act or Sections 2, 3 and 6 of the Interstate Commerce Act. Moreover, the lawfulness of any ancillary services which may be rendered to a shipper apart from the services covered by the Plan III and IV tariffs "really has no bearing upon the lawfulness of the plans themselves" (226 F. Supp. 324-325; J.S. 12a-13a).

4. The Commission correctly decided that the Plan III and Plan IV rates are compensatory and "not unreasonably low or destructive of competition, either in law, or in fact" (226 F. Supp. 325-326; J.S. 13a-14a).

5. Plans III and IV, and the rates and charges thereunder, are not violative of section 418 of the Interstate Commerce Act when used by freight forwarders (226 F. Supp. 326-327; J.S. 15a-17a).

In summary, the holding by the Commission and the district court was that it is appropriate and lawful for the railroads to publish reasonable and compensatory rates for each of the particular kinds of trailer-on-flatcar services desired by the shipping public.

ARGUMENT

The Jurisdictional Statement poses six questions alleged to be raised by the rulings of the district court (J.S. 9-10). Questions 1, 2, 3 and 4, however, misstate in varying degrees the issues presented and the rulings of the court thereon. The actual rulings of the district court are so clearly in accord with the settled construction of the governing statutory provisions as to warrant the grant of this motion.

1. Appellants' Question 1 (J.S. 9) rests on a misstatement of the court's holding. Neither the court nor the Commission held, as appellants assert (J.S. 15), that carriers can limit the Commission's jurisdiction to enforce the Interstate Commerce Act by means of terms contained in tariffs filed with the Commission. Appellants themselves acknowledge this in note 1 (J.S. 15) when they find it necessary to justify the terms used in their allegation of error by stating that the "holding of the court necessarily comes down to [this] proposition." What both the court and the Commission recognized was that in a case involving the lawfulness of the rates, charges and rules pertaining to Plan III and Plan IV terminal-to-terminal services, any question as to the lawfulness of the shipper's arrangements for the ancillary services which some railroads may have provided, either prior or subsequent to the transportation covered by the Plan III and Plan IV rates under investigation, raises a purely collateral issue which does not bear upon the lawfulness of such Plan III or IV rates. The ruling of the Commission on this point reads (314 I.C.C. 45; J.S. 78a):

> "While the furnishing of services which they do not hold themselves out to perform can be the source of illegal rebating by carriers for which they are liable to prosecution under the Elkins Act, nevertheless it cannot be said that carriers are barred from publishing rates for less than a so-called complete service."

The related ruling of the district court reads (226 F. Supp. 324-325; J.S. 12a):

> "Whether or not there are actually unlawful practices being indulged in in connection with Plans III and IV TOFC, really has no bearing upon the lawfulness of the plans themselves. If the railroads rebate, discriminate, or indulge in unlawful preference, or in any other way violate the Elkins or Interstate Commerce Acts, then they certainly are subject to censure and prosecution for those violations."

The clearest proof that the Commission did not conclude that these tariffs deprived them of jurisdiction over ancillary services is that the Commission has subsequently initiated, and has recently concluded an extensive rule-making proceeding which includes, *inter alia*, the prescription of rules governing these services. See *Ex Parte No. 230 Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Services)*, 322 I.C.C. 301 (1964).

2. Appellants concede that there is no issue in this case as to whether or not the Act prevents "a railroad from maintaining both a complete and partial service, assessing lower charges for the latter." They also concede that there is no question of "the right of a shipper to supply, at his own option, . . . components of the total transportation he needs" (J.S. 22). Nevertheless, in Appellants' question 2 they contend that Sections 1(3) and 1(4) of the Act require that the rail carriers hold themselves out to furnish all facilities and all services of transportation in all instances, and that they may not maintain rates for both complete and lesser service at the same time.

Section 1(4), which imposes the duty to furnish transportation, as defined in Section 1(3), is conditioned upon the presence of a reasonable request therefor. Accordingly, it is well settled that the duty imposed by Section

1(4) is not a universal or absolute one, but is conditioned upon the reasonableness of the request, and, in general, is relative to the conditions of trade and the business of shippers. *United States* v. *Pennsylvania R. R. Co.*, 242 U.S. 208, 230 (1916). Thus, the District Court, in rejecting Appellants' contention on the point under consideration, properly noted:

> "There is no indication whatever that the rails have not furnished all services reasonably requested by the shippers, and it is to be noted that shippers, rather than protesting the plans, have intervened on their behalf. We must conclude that the plaintiffs' first contention is groundless." (226 F. Supp. 323; J.S. 8a-9a).

It has long been recognized that separate rates for varying kinds of service are lawful and that the publication of a rate for a particular service, such as door-to-door, does not make unlawful the publication of a separate and lower rate for a lesser service. For example, this Court recently affirmed, on the merits, a decision of a three-judge district court which had upheld the Commission's approval of three different sets of rates of a freight forwarder, the highest rate being for application when the shipper desired a complete service and the two other rates being for application when the shipper desired lesser services. *National Motor Freight Traffic Association, Inc. et al.* v. *United States, et al.*, 371 U.S. 223 (1962); 372 U.S. 246 (1963). The exact rates approved in that case are set out in the Commission's report in that proceeding, 306 I.C.C. 535 at 536. The two motor carrier associations who were the appellants in that case are among the appellants here, but their Jurisdictional Statement here fails to mention the decision.

3. Appellants allege error in Question 3 by claiming that the lower court and the Commission in approving the practice of maintaining both complete service rates in Plan II and partial service rates in Plans III and IV

at the same time, rendered "inoperative the provisions of Section 15(13)", the allowance section of the Act. This argument, of course, presupposes that Section 15(13) must be operative in all situations as a matter of law, an assumption for which appellants offer no support whatsoever. Appellants' contention begins and ends with the supposition that Section 15(13) provides the only permissible method of accounting for different levels of service. However, as the Commission noted, that theory was rejected in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 531 (1945) and, in fact, the motor carriers themselves have for many years adopted rate publication practices similar to those of the rail carriers here (314 I.C.C. 45-46; J.S. 78a).

The court did not hold that the maintenance of Plan II rates had any effect, one way or the other, on the pertinency of section 15(13) to Plan III or IV rates. The Court said:

> ". . . if there were only Plan II tariffs, then, of course, services performed by the shipper would have to be considered by way of published allowances credited against the Plan II tariff, but in the presence of Plan III and IV tariffs, the question of allowances has no pertinency." (226 F. Supp. 324; J.S. 11a).

Clearly, Plans III and IV stand by themselves insofar as the application of section 15(13) thereto. The reason why section 15(13) does not apply—"inoperative" is the appellants' word—to the services or instrumentalities furnished by the shipper when using such plans was fairly stated by the district court as follows:

> "[The publication by a carrier of] a lower rate for carrying freight that is brought to it by the shipper . . . is not the rendering of any service under the Act connected with the transportation so far as the carrier is concerned. Its responsibility as a car-

rier under § 15(13) of the Interstate Commerce Act, begins when the lading is delivered to it for transportation. Pennsylvania R. Co. v. Ohio Public Utilities Comm., supra. [298 U.S. 170, 175 (1936)]

• • •

"Under Plan III the carrier's responsibility does not begin until the freight is delivered to it by the shipper, and such delivery by the shipper is not a part of the transportation covered by the Act.

• • •

". . . § 15(13) is not intended to require allowances unless the service provided by the shipper is within the tariff in use in the instance under consideration. We therefore must rule against the plaintiffs in regard to their second contention." (226 F. Supp. 324; J.S. 11a-12a).

While the case cited by the district court did not involve section 15(13), the principle there laid down is directly in point in the instant case.

In *United States* v. *Baltimore & O. R. Co.*, 231 U. S. 274 (1913), this Court recognized that when the performance by a shipper of a lighterage service is not embraced by the services held out under the published line-haul rate paid by the shipper, such shipper-furnished service cannot be the basis for a section 15(13) allowance, any more than could the service of "carting their shipments to a depot or station" (p. 287), whereas the rule is to the contrary when the lighterage performed is "included in the through rate" and is a part of the through service "which the railroads [are] under obligation to perform." (p. 293)

In short, Section 15(13) is always inoperative if the carrier's obligation as defined in the applicable tariff does not include the service or facility in question. *United States* v. *American Sheet & Tin Plate Co., et al.*, 301 U.S. 402, 408 (1937).

4. Question 4 is phrased as if the district court held that the Plan III and Plan IV tariffs "invite discrimination, preference, prejudice and rebating," but, nevertheless, are not in violation of the Elkins Act or of Sections 2, 3 and 6 of the Interstate Commerce Act (J.S. 10). The fact is that the holding of the district court denies the existence of the alleged invitation, and reads:

> ". . . there is nothing in either of these *plans* which provide for, or even suggest any 'rebate, concession or discrimination'. The types of service offered are available to all who wish to avail themselves of such services, and the rates are fixed and published for the type of service selected by the shipper." (226 F. Supp. 324; J.S. 12a) (Italics in original).

The district court also said:

> "Plans III and IV rates and charges do not violate the Elkins Act or §§ 2, 3 or 6 of the Interstate Commerce Act, nor were the railroads' practices under Plans III and IV shown to be unlawful on the record before this court." (226 F. Supp. 325; J.S. 13a).

The lack of substantiality in appellants' Question 4, is further indicated by the fact that every shipper who participated in the Commission proceeding supported Plan III and Plan IV as welcome developments in the interest and to the benefit of the shipping public. Furthermore, not a single shipper interest, with one minor exception,[1] expressed any fear of injury by reason of possible discriminatory practices of railroads in violation of tariff provisions and statutory obligations. But even if they had, the existence of potential opportunities for illegal practices could not provide a legal ground for condemning Plans III and IV. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 200 U.S. 536, 556 (1906).

[1] One Pacific Coast association of shippers objected to Plan IV on the ground "that it could not obtain flat cars nor solicit traffic for eastbound movements to avoid empty return." The Commission ruled that this difficulty did not establish unjust discrimination. (314 I.C.C. 50; J.S. 85a)

5. Question 5 is addressed to the alleged error of the district court "in holding that a highway trailer is not an instrumentality of transportation when transported by the rail carriers under [plan III and plan IV] tariffs . . ." (J.S. 10).

Ordinarily, having published a rate without qualification, the railroad is obliged, upon reasonable request, to provide whatever "instrumentalities" are necessary to perform the transportation. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 428 (1940). Thus under the Plan II tariffs, the railroad contracts for a complete door-to-door service, including trailer and drayage, on a given commodity. Under the Plan III tariffs, however, the railroad only contracts to move a large package of freight for the shipper between designated ramp points, the "package" in this instance taking the form of a trailer.

It matters not from what source the shipper procures the outer package. Some own their own trailers, some lease from outside sources and some lease from railroad trailer-leasing subsidiaries. As long as the railroad does not undertake to provide the shipper's package as part of the applicable Plan III tariff undertaking, however, the package (or trailer) is not an "instrumentality" as that term is used under Sections 1(3) and 15(13) of the Act.

6. Question 6 has already been decided by this Court in a recent case, cited and followed by the lower court, but not mentioned by the appellants. Their objection in this final issue is to the holding that freight forwarders can lawfully "provide their own trailers and their own flatcars when utilizing Plan III or Plan IV TOFC transportation . . ." (J.S. 14).[2] They contend that Section 418 of the

[2] Freight forwarders assemble individual shipments received from the public, consolidate them, ship the consolidated shipment to a destination terminal (paying the railroad tariff rates for the rail haul) and then break bulk and distribute the individual shipments to the consignees. They are regulated under Part IV of the Interstate Commerce Act, 49 U.S.C. § 1000 *et seq.*

Act should have been interpreted to prohibit such shipments by forwarders (J.S. 23). However, six of these appellants urged their same interpretation of Section 418 to this Court only two years ago in opposition to the forwarders' use of Plan III transportation, and the decision was squarely against their contention. *Eastern Express, Inc. et al.* v. *United States, et al.*, 369 U.S. 37 (1962).

In that per curiam decision this Court affirmed a decision of a three-judge court for the Southern District of Indiana, 198 F. Supp. 256 (1961). The ruling as to Section 418 was that "rail shipments by the freight forwarders of their trailers, loaded or empty, under the rail Plan III piggyback rates published by the railroads and available for the use of the shipping public, are not unlawful under said section" (198 F. Supp. at 265). The affirmance by this Court determined that question of Section 418 with finality.

The lower court in the present case noted that, as to the forwarders' use of Plan III, the appellants' argument had been disposed of in the *Eastern Express* case (226 F. Supp. 326; J.S. 15a). While Plan IV rates were not directly involved in that case, the principle applies to both piggyback plans, and the court so held, approving the decision of the Commission to the same effect (226 F. Supp. 326; J.S. 15a-16a).

Neither the wording of Section 418 nor its legislative history lends any support to the motor carriers' contention, which has been rejected by this Court, the two lower courts and the Commission. Clearly the forwarders are not utilizing "the instrumentalities or services of any carriers other than common carriers by railroad . . ." (49 U.S.C. § 1018), when they tender their flatcars or trailers, loaded or empty, for transportation by the railroad. And the legislative history, part of which is described in the opinion below (226 F. Supp. 326-327; J.S. 16a and 17a), shows that the purpose of Congress in this section was to prohibit the use of contract carriers, a subject which has no relation to the present case.

CONCLUSION

Since this appeal presents no issue of substance warranting plenary consideration, the judgment of the district court should be affirmed.

CARL E. ENGGAS
1006 Grand Avenue
Kansas City, Missouri 64106

D. ROBERT THOMAS
11 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Freight Forwarder Appellees

JOHN F. DONELAN
Brawner Bldg.
Washington, D.C. 20006
Attorney for The National Industrial Traffic League, Appellee

NUEL D. BELNAP
One North LaSalle Street
Chicago, Illinois 60602
Attorney for Shipper Appellees

LOUIS A. HARRIS
HARVEY HUSTON
80 East Jackson Blvd.
Chicago, Illinois 60604
Attorneys for Transcontinental Railroads, Appellees

JOHN A. DAILY
PAUL R. DUKE
1138 Transportation Center
Philadelphia, Pa. 19104
Attorneys for Eastern Railroads, Appellees

PROOF OF SERVICE

I, PAUL R. DUKE, Attorney for these Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of August, 1964, I served copies of the foregoing Motion to Affirm on the several parties as follows:

1. On the United States by mailing a copy, properly addressed, with postage prepaid to each of the following: Honorable Archibald Cox, The Solicitor General; William H. Orrick, Jr., Assistant Attorney General; Michael Freed, Attorney, Department of Justice, Washington 25, D.C.; and F. Russell Millin, United States Attorney, Kansas City, Missouri.

2. On the Interstate Commerce Commission by mailing a copy, properly addressed, with postage prepaid to each of the following: Robert W. Ginnane, General Counsel and Leonard Goodman, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On Cooper-Jarrett, Inc. et al., Appellants, by mailing a copy, properly addressed, with postage prepaid to each of the following: Kenneth E. Midgley, 1500 Commerce Building, Kansas City 6, Missouri; Thomas J. Hogan, 1450 Wabash Avenue, Terre Haute, Indiana; LeGrand A. Carlston, 4045 Pecos Street, Denver 11, Colorado; Bryce Rea, Jr., 917 Munsey Building, Washington, D. C. 20004; Roland Rice, Homer S. Carpenter, John S. Fessenden, 618 Perpetual Building, Washington, D. C. 20004.

PAUL R. DUKE

APPENDIX "A"

List of Appellees

EASTERN RAILROADS

The Baltimore & Ohio Railroad Company
Boston and Maine Railroad
The Central Railroad Company of New Jersey
Chicago, Rock Island and Pacific Railroad Company
Erie-Lackawanna Railroad Company
Fort Worth and Denver Railway Company
Illinois Central Railroad
Lehigh Valley Railroad Company
Louisiana & Arkansas Railway Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
The New York Central Railroad Company
New York, Chicago and St. Louis Railroad Company
The New York, New Haven and Hartford Railroad Company
The Pennsylvania Railroad Company
Reading Company
St. Louis-San Francisco Railway Company
St. Louis-San Francisco and Texas Railway Company
St. Louis Southwestern Railway Lines
The Texas and Pacific Railway Company
Wabash Railroad System

TRANSCONTINENTAL RAILROADS

The Atchison, Topeka and Santa Fe Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago, Milwaukee, St. Paul & Pacific Railroad Company
Great Northern Railway Company
Northern Pacific Railway Company
Southern Pacific Company
Union Pacific Railroad Company
The Western Pacific Railroad Company

FREIGHT FORWARDERS

The Freight Forwarding Institute
ABC Freight Forwarding Corporation
Acme Fast Freight, Inc.
American Freight Forwarding Corporation
Blue Ribbon Express, Inc.
Clipper Carloading Company
Flynn Forwarding Company, Inc.
International Forwarding Company, Inc.
Lifschultz Fast Freight
Merchant Shippers Association
Midland Forwarding Corporation
National Carloading Corporation
Ohio Fast Freight Corp.
Pacific and Atlantic Shippers, Inc.
Republic Carloading & Distributing Company, Inc.
Sheldon Forwarding Company
Springmeier Shipping Company, Inc.
The Texas Freight Company, Inc.
Universal Carloading & Distributing Company, Inc.
Western Carloading Co., Inc.
Westland Forwarding Co.

SHIPPERS

The National Industrial Traffic League
Drug & Toilet Preparation Traffic Conference
Manufacturing Chemists' Association
Merck & Company
Swift & Company